

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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5 In the Matter of:

6 LEHMAN BROTHERS HOLDINGS INC., Case No. 08-13555-scc

7 Debtor.

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9
10 United States Bankruptcy Court

11 One Bowling Green

12 New York, New York 10004-1408

13
14 June 7, 2018

15 10:02 AM

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23 B E F O R E:

24 HON. SHELLEY C. CHAPMAN

25 U.S. BANKRUPTCY JUDGE

1 IN RE: Doc #57036 Motion of the Plan Administrator for an
2 Order in Aid of Execution of the Modified Third Amended
3 Joint Chapter 11 Plan of Lehman Brothers Holdings Inc. and
4 Its Affiliated Debtors

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25 Transcribed by: Dawn South

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. Good morning.

3 Hello, Mr. Fail, how are you?

4 MR. FAIL: Good morning, Your Honor. Well, thank
5 you.

6 THE COURT: This case is still going on?

7 MR. FAIL: Coming up on ten years, Your Honor.

8 THE COURT: Yes, it is coming up on ten years.

9 All right. So lots of pleadings. Thank you for
10 the agenda. I've read everything, but I'm happy to hear
11 from you and anyone else who wishes to be heard this
12 morning.

13 MR. FAIL: Thank you, Your Honor. For the record,
14 Garrett Fail, Weil, Gotshal & Manges, for Lehman Brothers
15 Holdings Inc. as plan administrator.

16 Your Honor, for more than six years since Lehman's
17 plan effective date the plan administrator has pursued
18 recoveries on behalf of creditors of the U.S. Chapter 11
19 estates and has successfully recovered vast amounts both
20 from foreign affiliates and from third parties who often
21 sought entitlements, the same assets that the plan
22 administrator did.

23 LBHI acted as it was charged to pursuant to
24 Section 6.1(b) of the plan, to maximize distributions to
25 holders of allowed claims and to make distributions

1 consistent with the prepetition global capital structure.

2 Pursuant to that charge over 15 distributions, the
3 plan administrator distributed approximately 44 and a half
4 percent to LBHI's senior unsecured creditors. Only about
5 six percent of that, Your Honor, was available cash at the
6 first distribution date. The remaining majority was
7 collected or became available over the next 14 distribution
8 cycles.

9 Under unique circumstances across the Chapter 11
10 estates the plan administrator distributed a staggering
11 \$124.6 billion, including \$92.2 billion on account of third
12 party and non-controlled affiliate claims, and \$32.4 billion
13 among the debtors and their controlled affiliates.

14 The motion on today's agenda seeks an order in aid
15 of further execution of the plan. There's no question that
16 the relief requested is in the best interest of LBHI's
17 estate and all of LBHI's creditors.

18 We understand the Court has reviewed all of the
19 filings in advance of the hearing, we recognize the Court's
20 busy docket, and respectfully I will not walk through the
21 motion or the plan administrator's reply. The Court simply
22 has the authority to grant the relief requested pursuant to
23 Sections 105 and 1142 of the Bankruptcy Code. None of the
24 objections precludes entry of the proposed order. Given our
25 substantive response it's not clear which, if any, of the

1 objections will be prosecuted this morning.

2 So I'm prepared to answer any questions that the
3 Court may have for the plan administrator at this time and
4 would otherwise reserve time to reply to any arguments made
5 this morning.

6 THE COURT: Where does the plan administrator
7 stand on the question of standing? Is that something I need
8 to address from your perspective?

9 MR. FAIL: Based on the pleadings, Your Honor, it
10 didn't matter who was going to make the arguments --

11 THE COURT: Okay.

12 MR. FAIL: -- we're not looking to -- just to have
13 Deutsche Bank or Barclays precluded and to have the general
14 partner stand up and make the same arguments. The arguments
15 are out there, we're sure the Court would consider them sua
16 sponte or whoever was arguing it. It's not an issue --

17 THE COURT: Okay.

18 MR. FAIL: -- that we're going to make the Court
19 decide.

20 THE COURT: All right. Thank you. That's
21 helpful.

22 All right. So why don't I hear from, it looks
23 like Mr. Dorchak is going to be first up, and then I might
24 have some questions for you.

25 MR. FAIL: Thank you, Your Honor.

1 THE COURT: Thank you.

2 Hello, Mr. Dorchak --

3 MR. DORCHAK: Good morning, Your Honor.

4 THE COURT: -- how are you?

5 MR. DORCHAK: I'm fine, Your Honor. How are you?

6 THE COURT: I'm okay.

7 MR. DORCHAK: Great. For the record, Joshua
8 Dorchak, Morgan Lewis & Bockius LLP, on behalf of Deutsche
9 Bank, London Branch.

10 THE COURT: Can I ask you, do others intend to
11 speak or are you kind of taking the laboring on behalf of
12 all of -- not on behalf of the objecting parties -- but are
13 others planning to speak as well?

14 MR. DORCHAK: My understanding, Your Honor, is
15 that Barclays is going to address one point briefly --

16 THE COURT: Okay.

17 MR. DORCHAK: -- after I finish. I don't know of
18 anyone else --

19 THE COURT: Okay.

20 MR. DORCHAK: -- unless maybe liquidator's
21 counsel --

22 THE COURT: Okay.

23 MR. DORCHAK: -- that would like to say something.

24 THE COURT: All right. Thank you.

25 MR. DORCHAK: Before I actually do argue anything

1 if it please the Court I'd like to introduce the
2 representatives from Deutsche Bank who have flown in for the
3 hearing.

4 THE COURT: Okay.

5 MR. DORCHAK: It includes Michael Sutton, who's in
6 the front row.

7 THE COURT: Hello.

8 MR. DORCHAK: Our declarant. And Jamie Liu (ph),
9 his colleague next to him.

10 THE COURT: Okay. Hello.

11 MR. DORCHAK: Also Phillip Taylor, who's UK
12 counsel (indiscernible). And with me at the table in front,
13 Melissa Boey, my colleague, and Alex Roviera from Sidley in
14 New York, as co-counsel. Just so I've introduced people.

15 THE COURT: Okay.

16 MR. DORCHAK: Thank you, Your Honor.

17 So that was a very short introduction. I'm not
18 surprised that it was short because the premise behind the
19 motion is this is no big deal. Either because it's simply
20 fulfilling the duty to maximize distributions to creditors
21 or because we've done it before or whatever. It's a bunch
22 of complicated stuff in England, you don't have to worry
23 about it, this is just straight up trying to kick out more
24 money to the creditors. Okay. So --

25 THE COURT: It's a little more nuanced than that,

1 Mr. Dorchak.

2 MR. DORCHAK: Well I'd like to get much more
3 nuanced than that actually, so that's why it's going to take
4 me a little longer than it took Mr. Fail, if that's all
5 right with Your Honor. But what I don't want to do, unless
6 you want me do, is go through the elaborate factual
7 background and the waterfall and the options --

8 THE COURT: I understand.

9 MR. DORCHAK: -- like the players and all that.
10 I'd like to stick to the --

11 THE COURT: The question is --

12 MR. DORCHAK: -- matters of the law.

13 THE COURT: -- the sole question is whether or not
14 this is something that can be authorized under the plan.
15 That's the question.

16 MR. DORCHAK: Right. Whether or not the relief
17 sought furthers the terms of the plan or whether it actually
18 contradicts them, in a null shell. And I've got four
19 sections of the Bankruptcy Code that I think the motion
20 offends and I'd like to go through those.

21 THE COURT: Well I don't know that I agree with
22 your characterization of the issue that way.

23 MR. DORCHAK: Okay.

24 THE COURT: And this is -- it's kind of
25 simplistic. But the plan administrator, on a very simple

1 level, argues that enhancing the distributions to the Lehman
2 creditors would be in furtherance of the plan, but the
3 question is whether or not it is permitted by the plan.

4 MR. DORCHAK: Oh, I agree with that
5 characterization, Your Honor.

6 THE COURT: Right? That's the question. Not -- I
7 mean we can almost stipulate to the fact that if Lehman is
8 permitted to do what they seek to do, subject to whatever
9 would happen in England, which is not uncomplicated, that
10 there's a substantial likelihood that there would be an
11 enhancement of distributions to LBHI creditors. So that's
12 not the question. The question is, can they do it?

13 MR. DORCHAK: I agree with that. My answer is no,
14 Your Honor.

15 THE COURT: Your answer is no.

16 MR. DORCHAK: I'm going to try and tell you why.
17 The -- we were accused of getting overly rhetorical with our
18 time machine --

19 THE COURT: You were pretty rhetorical.

20 MR. DORCHAK: Well I stand by all the rhetoric,
21 Your Honor, because I think it had a point, it was
22 actually --

23 THE COURT: I expected you to have slides of --
24 from the movie Back to the Future.

25 (Laughter)

1 MR. DORCHAK: I didn't want to get silly about it,
2 Your Honor, but I think the point was a legitimate one, that
3 what they're asking for here, what they tell you is no big
4 deal is actually -- we should be able to stipulate that it's
5 extraordinary for a debtor operating under a Chapter 11 plan
6 to say just let me pretend it's 2008 and go back and do some
7 stuff that I say I could do, trust me, in 2008, and then let
8 me -- that stuff happened in 2011, 2012, and then we'll come
9 back to now and I'll go to England some day, I don't know
10 when, and do some stuff that you don't have to worry about
11 it. That to me is not just a simple request to fulfill a
12 specific subsection of the plan. And to the extent there is
13 a specific subsection of the plan that the debtors hang this
14 all on it's the one that you just mentioned.

15 So I can just look at that specifically for a
16 moment, maybe that's a good --

17 THE COURT: Okay.

18 MR. DORCHAK: -- thing to start with. Section
19 6.1(b)(iii) is the subsection that permits the plan
20 administrator to "maximize distributions to holders of
21 allowed claims."

22 My point about that subsection is that it's a
23 subsection and it's subject to the introductory portion of
24 Section 6.1(b), which reads -- well sorry -- authorizes the
25 plan administrator to "carry out and implement the

1 provisions of the plan, including without limitation .."

2 and then you get to maximizing distributions.

3 So my -- it's a simple point but I think it's

4 important, maximizing distributions is not an absolute.

5 It's not carte blanche. It's not a ticket to do whatever

6 you want as long as it's good for the creditors. So you've

7 got to do something that the plan tells you you can do. You

8 have to be implementing the plan in a way that benefits the

9 creditors. And that's why we're here arguing.

10 As you said, Your Honor, we're not arguing about

11 whether if they win long term in England some money might

12 come in and then go back out of the creditors, we're not --

13 we don't dispute that.

14 Okay. Now, the reason I don't believe in a very

15 non-rhetorical academic legal way that the relief sought is

16 consistent with the concept of implementing the plan is four

17 fold. So you're probably groaning already, but just -- I'll

18 try to be efficient. Okay?

19 First let's talk about Section 1127, which

20 provides that the proponent of a plan may modify the plan

21 before it goes effective, but then after the plan goes

22 effective it can't -- well sorry -- after it's substantially

23 consummated the debtor can't modify the plan further.

24 And LBHI doesn't dispute that the plan has been

25 substantially consummated, and they don't dispute that they

1 can't modify the plan today. So we're not arguing about
2 that that. They say they're not modifying the plan.

3 THE COURT: Right.

4 MR. DORCHAK: Okay. That's my first legal
5 statutory question I'd like to look at. And I have two
6 points on this.

7 The first one is if you look at Section 1127 --

8 THE COURT: Right. They say they're not modifying
9 the plan, right?

10 MR. DORCHAK: Modifying -- modify being a term
11 that needs to be decided on a case by case basis. And I
12 would have thought it meant change. They say well it
13 depends what it means. And they cite Judge Glenn for this,
14 and I'll get to the --

15 THE COURT: Okay.

16 MR. DORCHAK: -- I'll get to their interpretation.
17 To me modification doesn't necessarily need to be explained.

18 But here's one thing that 1127(b) explicitly says.
19 Even before the plan goes substantially consummated it can't
20 be modified such that the plan as modified fails to meet the
21 requirements of Sections 1122 and 1123.

22 So whatever else modify might mean Congress said
23 out loud you can't change a plan in a way that contradicts
24 Section 1122 or 1123. It's right there in the statute.

25 THE COURT: Okay.

1 MR. DORCHAK: So obviously the next question is,
2 well what do those two sections say? Section 1123(a)(6)
3 says that a plan has to provide, if the debtor is a
4 corporation, that the corporate charter, the new one
5 established under the plan, include as provision prohibiting
6 the issuance of non-voting equity securities. That's a
7 quote. Okay. That's what you can't do.

8 What does the motion seek to do? The motion seeks
9 to get permission to issue these substitute preferred
10 securities. But here's my punch-line, Your Honor, the
11 substitute securities are securities that as defined in the
12 governing documents have no voting rights. So that's plain
13 and simple, it's in the offering circular and we've quoted
14 it in our brief.

15 So LBHI is saying modify is a vague term, and I'm
16 saying well whatever modify means Congress said you can't
17 change a plan in a way that explicitly contradicts 1123.
18 1123 says you can't issue non-voting securities and you just
19 told me --

20 THE COURT: I'm still confused --

21 MR. DORCHAK: -- you want to issue --

22 THE COURT: -- if LBHI is not taking the position
23 that this constitutes a modification of the plan --

24 MR. DORCHAK: Uh-huh.

25 THE COURT: -- they're not taking that position,

1 right? Then why are we talking about 1127 anymore?

2 MR. DORCHAK: My -- I guess it's an argument is
3 that it may be open to question what modification means
4 generally, but when Congress says out loud that a certain
5 specific thing can't be done then obviously Congress
6 considers that a modification.

7 THE COURT: Okay. I'll try it one more time.
8 What you're saying is even though Lehman is saying that
9 they're not modifying the plan, you're saying that they are
10 modifying the plan --

11 MR. DORCHAK: Uh-huh.

12 THE COURT: -- attempting to modify the plan --

13 MR. DORCHAK: Right.

14 THE COURT: -- and that they can't because of the
15 argument that you've laid out.

16 MR. DORCHAK: They agree that they can't modify
17 the plan, right? They just say that's not what they're
18 doing. I say that's what they are doing for two reasons,
19 and I just gave you the first one.

20 THE COURT: Okay.

21 MR. DORCHAK: Which is modification may generally
22 be a vague term that needs to be --

23 THE COURT: Modify is not a vague term.

24 MR. DORCHAK: Okay.

25 THE COURT: It's pretty simple. They say they're

1 not modifying it, you say they are -- maybe they are
2 modifying it and they can't modify it because they don't
3 comply with the provisions of the Code, right? I mean
4 that's it in a nutshell, right?

5 MR. DORCHAK: I'm saying you can't get vague about
6 what Congress said specifically, and Congress said this
7 thing specifically about non-voting securities.

8 So before we even get to what modified might mean
9 it can't mean what they want to do on the face of the
10 statute. All right?

11 THE COURT: Okay.

12 MR. DORCHAK: The follow-up argument is if you
13 don't believe that, okay, let's talk about what modify could
14 mean according to Judge Glenn, and Judge Glenn defined
15 modification -- this is in the In re Boilen (ph) case that
16 we both cite -- as "the alteration of legal relationships
17 among the debtors and the creditors and other parties in
18 interest." So that's what they say they're not doing --

19 THE COURT: Uh-huh.

20 MR. DORCHAK: -- and that's what I say they are
21 doing. Although this is my second argument. All right. On
22 this point.

23 So why do I say that they're altering the legal
24 relationship amongst themselves and the ECAPS holders? I
25 mean probably know what I'm going to say, it seems obvious

1 to me, the first way in which they're modifying legal --
2 their legal relationship is that they're taking the ECAPS
3 holders who in such capacity are strangers to this plan and
4 they're saying we're going to jam you into Class 12 of
5 LBHI's creditor --

6 THE COURT: If they're strangers to the plan how
7 can there be a relationship?

8 MR. DORCHAK: They're trying to create a
9 relationship where there is none, and that is a change from
10 non-legal relationship to legal relationship. I feel pretty
11 good that that is a legal -- an alteration in a legal
12 relationship.

13 And my follow up is similar, which is if this
14 relief is granted they basically get a ticket to sue the
15 ECAPS holders in London. They can't do that today. That's
16 why we're here.

17 THE COURT: Uh-huh.

18 MR. DORCHAK: If you grant the relief and give
19 them something they can go over to England and offer to us,
20 not that we want it, now they've got at least a purported
21 basis to sue us when they couldn't before, and being free --
22 freedom from being sued turning into being sued to me is a
23 change in a legal relationship.

24 Now, we of course on the merits dispute what
25 they're going to say, but that's not my point, my point is

1 it went from not being a potential defendant to being a
2 potential defendant. To me that's an alteration of the
3 legal relationship.

4 And then the third way, which is a little more
5 elaborate, is that there are various guaranteed claims
6 indirect or directly related to the ECAPS.

7 THE COURT: Lots of parties can become defendants
8 as a result of things that occur beyond their control,
9 right?

10 MR. DORCHAK: Sure.

11 THE COURT: For example, I don't know,
12 indemnification claims could arise, right?

13 MR. DORCHAK: Sure.

14 THE COURT: And so the just a simple fact of, as
15 you put it, going from a non-relationship status to a
16 relationship status isn't in and of itself offensive, right?

17 MR. DORCHAK: I think it's a change. I don't have
18 to prove it's offensive, I have to prove that it's an
19 alteration of a legal relationship. You can sue me, you
20 can't sue me. Something has changed there, the legal
21 relationship. I mean lawsuits are based on legal
22 relationships.

23 THE COURT: Yes. But my point is that often time
24 you can become part of, as you put it, a legal relationship
25 because of things that other people do, and that's not

1 necessarily -- you don't necessarily have a veto over that.

2 If there are two parties in a dispute --

3 MR. DORCHAK: Uh-huh.

4 THE COURT: -- and they resolve that dispute and
5 that gives rise to an indemnification claim against somebody
6 who the moment before that resolution was, as you put it,
7 without a relationship, all of a sudden they're now in a
8 relationship, right, as an indemnity.

9 MR. DORCHAK: But a legally different relationship
10 I would say.

11 THE COURT: Right.

12 MR. DORCHAK: Yes. And if that happens to the
13 ECAPS holders because of something beyond their control it's
14 still happening, it's happening because LBHI is making it
15 happen. That's my point. They're the ones changing the
16 legal relationship.

17 THE COURT: Yes, but the question -- but it's
18 circular. The question is whether they're entitled to do
19 that. So --

20 MR. DORCHAK: But we know they're not because
21 Section 1127 says they can't.

22 THE COURT: If we knew that they were not,
23 Mr. Dorchak, we wouldn't be here. So the question is
24 whether or not they can do it.

25 So once again, the fact that If Lehman was granted

1 the relief, as you in your words, I'm not adopting them, I'm
2 just trying to --

3 MR. DORCHAK: Understood.

4 THE COURT: -- articulate what you're telling me,
5 is that the fact that the ECAPS holders would then be in a
6 relationship is not per se objectionable. The question is
7 whether Lehman is entitled to bring them into that
8 relationship.

9 MR. DORCHAK: Entitled to alter the current
10 relationship.

11 THE COURT: Yes, exactly. Right.

12 MR. DORCHAK: Of course it would. The ECAPS
13 holders are all creditors of LBHI already, there's a legal
14 relationship already, right?

15 THE COURT: But you're telling me --

16 MR. DORCHAK: But as ECAPS --

17 THE COURT: -- something differently.

18 MR. DORCHAK: Right. I'm acknowledging there is
19 something that would be consistent but then this would be
20 something that I say would change. And they admit that if
21 there is an alteration then they can't get this relief.
22 That's what the dispute is, if they're actually altering a
23 legal relationship. I say yes, they say no. And I'm happy
24 to move on to my next point --

25 THE COURT: Sure.

1 MR. DORCHAK: -- with my point having been made.
2 Except I did want to throw in one PS, which is just because
3 you're -- the thing you're trying to do increases creditor
4 -- increases the distributions to creditors from your estate
5 that's not enough to get you an exemption of some sort from
6 1127. So Judge Bernstein's Rickle (ph) case --

7 THE COURT: Hold on one moment, Mr. Dorchak.

8 MR. DORCHAK: Uh-huh. Sure.

9 THE COURT: We're getting word that the phone line
10 cut off.

11 MR. DORCHAK: Okay.

12 THE COURT: So if you would take a moment and --

13 MR. DORCHAK: Shall I sit down?

14 THE COURT: No, you can stand.

15 MR. DORCHAK: Already.

16 THE COURT: Or sit, whichever you want.

17 MR. DORCHAK: A little sip of water maybe? Thank
18 you.

19 THE COURT: Sounds good.

20 (Pause)

21 THE COURT: Sorry about that, Mr. Dorchak, we
22 don't know what happened, but we appear to be back.

23 MR. DORCHAK: No problem, Your Honor. I remember
24 what I was going to say. Should I continue?

25 THE COURT: Please.

1 MR. DORCHAK: Okay. I was talking about there
2 being no exemption from a Section 1127 just because what
3 you're doing is beneficial for the estate so what's the harm
4 in some abstract notion, and Judge Bernstein's Rickle case,
5 which we cited a couple times and there's also a case, SCH
6 Corp., which was cited by both parties from the Third
7 Circuit in 2015 makes this clear, a modification, if it was
8 one, still violates 1127 even if it's good for the
9 creditors.

10 All right. Now I'm ready to go on to 1142, that's
11 the second section --

12 THE COURT: Okay.

13 MR. DORCHAK: -- of the Bankruptcy Code -- or the
14 third if you include 1123, and I think it's violated by this
15 motion. And I want to start out by saying you may -- I'm
16 sure you noticed this -- they made a motion under Section
17 1142. We objected and said you can't have that for all the
18 following reasons and we also discussed 1127, it's blocking
19 the relief that they sought.

20 On reply, as you noticed, what they did
21 essentially was well number one there's a bunch of
22 complicated stuff that's going on in England so don't worry
23 about all that, number two, this Court has the power to
24 trump anything the ICC or the IRS, or the Delaware corporate
25 lawyers have to say about anything. Okay, that's the side

1 issue, I don't care about that. But around page 10 of their
2 brief they say the thing about everything is okay because
3 we're going to do this as if it was 2008. It's one
4 sentence. And then after that the rest of the brief is
5 argument that they're not modifying the plan under 1127. In
6 other words the thing we just talked about. But they never
7 mention Section 1142 in a substantive way in their reply.
8 And my theory is because they know that they've got a
9 problem under 1142. But all right, well I'm going to try
10 and argue now why they do.

11 But before I say what it is that's wrong with the
12 1142 relief I wanted to make one point, which is this. Just
13 -- even if they convinced you that they're right, that the
14 motion does not offend Section 1127, it's all good, they're
15 not modifying anything.

16 THE COURT: Uh-huh.

17 MR. DORCHAK: The fact that they're not violating
18 1127 is not a basis to grant the motion, because after all
19 the motion doesn't violate dozens of sections of the
20 Bankruptcy Code --

21 THE COURT: Right.

22 MR. DORCHAK: -- and you can't issue an order
23 saying this is okay because it doesn't violate Section 1127.
24 So they need affirmative relief under 1142. And so even if
25 I haven't said anything you're convinced by yet they still

1 have to convince you on 1142.

2 Now, 1142, as you Your Honor says in subsection
3 (a) that the debtors shall carry out the plan. Okay. So
4 again, carry out the plan just like I pointed out that the
5 plan can only be carried out in a way that's consistent with
6 the plan. And then Section (b) says that the Court may --
7 not shall -- may direct the debtor to transfer any property
8 dealt with by a confirmed plan and to perform any other act
9 that is necessary for the consummation of the plan.

10 So to get the relief under 1142 LBHI has to
11 convince you that number one that what they're asking for is
12 necessary for the consummation of the plan. That's what the
13 statute says. And then number two, even if they've
14 convinced you it's necessary, that it's something that you
15 in your discretion should do, because you may do that, but
16 you don't have to do that.

17 My position, as you can imagine, is that the
18 necessity factor does not exist here, and I'll tell you why.
19 The first one is sort of philosophical. They admit that the
20 plan has been substantially consummated. So how can
21 anything be necessary to consummate the plan when it's
22 already been substantially consummated? I'm not sure you
23 need --

24 THE COURT: I don't understand that inconsistency.

25 MR. DORCHAK: Okay.

1 THE COURT: Substantially consummated is a term of
2 art.

3 MR. DORCHAK: Uh-huh.

4 THE COURT: Substantially is not entirely.
5 Substantially consummated is a useful and important term in
6 other context. But you can have substantially completed
7 painting your house and it's still necessary for you to go
8 out and buy a little pint of paint because you have a small
9 section still to paint. So --

10 MR. DORCHAK: I take your point.

11 THE COURT: -- I don't really --

12 MR. DORCHAK: Okay.

13 THE COURT: -- that's not a killer argument.

14 MR. DORCHAK: No, that was -- that's my warm-up
15 argument. That's the one that I said was somewhat
16 philosophical. All right? I've got -- I'll move around the
17 more legal points.

18 And there's another sort of philosophical point.
19 Which is how could -- they want this relief to be granted as
20 if it were 2008. So the philosophical point there is, how
21 can anything that occurs in 2008 be necessary to consummate
22 a plan that isn't even going to be proposed for another
23 three years? I mean there's a disconnect between what they
24 -- they want to get away with --

25 THE COURT: Well now you're doing a Schrodinger's

1 cat on me, right? You're -- right?

2 MR. DORCHAK: They're doing on you, Your Honor,
3 yes. That's why I said that one is kind of philosophical
4 too. I stand by it. But here's the real one, the drum
5 roll, the real reason why.

6 The most important thing about this motion in
7 general is the reason why it's not necessary for the
8 consummation of the plan, which is that it absolutely
9 contradicts the plan.

10 Now that's more than just a logical trick to say
11 it's not necessary for the consummation of a plan to do
12 something that contradicts the consummation of that plan.
13 So what's the contradiction? But you know what I'm going to
14 say. The plan and the confirmation order, the amended
15 charter, the amended bylaws, they all say flat out LBHI's
16 stock common and preferred is being canceled, one share
17 remaining goes to the plan trust and the -- I mean I could
18 go and read all this but you know -- I'll just pick one if
19 you don't mind.

20 THE COURT: Uh-huh.

21 MR. DORCHAK: The amended bylaws don't just say
22 that the old stuff is canceled, you know, implying there
23 shouldn't be any new stuff because after all there's only
24 one share now, actually the minute bylaws actually say out
25 loud "unless otherwise required by law no capital stock of

1 the corporation shall be issuable or transferable to any
2 person other than the plan trust as defined in the plan."
3 That's just flat out LBHI in its capacity as a -- acting
4 under the plan can't issue LBHI stock to anybody except the
5 plan trust, and the ECAPS holders are not the plan trust,
6 and that's a glaring absolute inconsistency.

7 And I could beat away at the point, I don't think
8 I need to, Your Honor, I mean that's -- it's not consistent
9 with canceling all the stock and not being able to issue
10 more stock to say you know what, let's issue some more stock
11 and it's no big deal. I don't know -- I don't really have
12 much else to say on that point.

13 THE COURT: Okay.

14 MR. DORCHAK: I'll move on to the well we've done
15 it before argument. There's a list of prior orders entered
16 in this case that LBHI cites, and I won't go through it,
17 like you've already -- this Court has already decided that
18 we can sort of create equity whenever we feel like it. But
19 it's all off point, surprise, and I won't even talk about
20 the administrative stuff, the purely ministerial stuff. But
21 the idea that you can grant this motion today because, you
22 know, Judge Peck said that they could -- that the debtors
23 can kick out distributions one week before or after the date
24 in the plan. I mean that's not precedence.

25 The more substantive orders that have been entered

1 -- I won't go into detail -- but they all do the same thing,
2 which is they decide how an existing prepetition claim
3 against the estate should be classified whether it's
4 subordinated or not in a word. This motion does not seek to
5 take an existing claim and say, you know what, Your Honor,
6 this should be subordinated. It seeks to create all of a
7 sudden ten years retroactively a supposed equity interest
8 and then go ahead and treat it under the plan. That's -- I
9 submit that's different than what the precedent does.

10 And I don't think I want to say anything else
11 about that unless Your Honor wants to hear something else
12 about that.

13 THE COURT: Okay.

14 MR. DORCHAK: I'm turning the corner, Your Honor,
15 I'm almost there.

16 THE COURT: Very good.

17 MR. DORCHAK: We have an important side which,
18 which is I haven't brought this up yet, but the confirmation
19 order --

20 THE COURT: Uh-huh.

21 MR. DORCHAK: -- as the force of law, and in
22 general the plan of course has the force of law -- but
23 that's -- you know, that's why this is important -- the plan
24 is the law of Lehman, right?

25 THE COURT: Yep.

1 MR. DORCHAK: And the confirmation order makes it
2 a binding final judgment. If they want to do what they
3 propose to do they have to show you it's okay under the
4 plan, but they also have to show you it's okay to modify the
5 confirmation order. It's a different -- it's a related
6 thing, but it's a different thing.

7 THE COURT: Uh-huh.

8 MR. DORCHAK: And they didn't even try to meet the
9 standard for Rule 60, and I don't think they can. Why we
10 think they can't is in our brief, I won't go into it, but I
11 don't think that should get swept under the rug.

12 My last issue, the old rejected contract issue.
13 The -- I wanted to start out by just saying something which
14 everyone should know, I have a quote from Judge Seibel
15 affirming Judge Drake in the A&P case, but it could have
16 come from somewhere else.

17 "Rejection of executory contracts are fundamental
18 issues of bankruptcy law unique to the Bankruptcy Code and
19 thus challenges to the effects of rejection orders are core
20 proceedings because of claims that would not exist
21 independent of the bankruptcy case."

22 Now you know that -- close quote, I'm sorry. You
23 know that. I bring it up because isn't it strange that the
24 debtors want a judge in England to decide all this
25 complicated rejected contract stuff that they put in their

1 footnotes in their reply.

2 THE COURT: Can you direct me to that? I didn't
3 read that that way. In the reply or in the main brief?

4 MR. DORCHAK: No, let me (indiscernible),
5 Your Honor. As part of this sort of trust me all this
6 interesting stuff that's going to happen in England some day
7 theme.

8 THE COURT: I mean I -- there was substantial --

9 MR. DORCHAK: Footnote 6.

10 THE COURT: In the opening brief or the reply
11 brief?

12 MR. DORCHAK: No. No, not in the opening.

13 THE COURT: The reply brief. Okay. Hold on.

14 MR. DORCHAK: There's a massive footnote 6 at the
15 bottom of page 3.

16 THE COURT: Right.

17 MR. DORCHAK: Right. Actually it's up in the text
18 as well, paragraph 8.

19 (Pause)

20 THE COURT: I wasn't reading this to say that LBHI
21 intended to have a discussion with an English court about
22 the effects of contract rejection or executory contracts
23 under the Bankruptcy Code. My impression is that if they --
24 if LBHI clears the hurdle here that the issue before the
25 English court would be the ability to issue the substitute

1 preferred stock. So I just don't --

2 MR. DORCHAK: Okay.

3 THE COURT: I'm just trying to follow your --

4 yeah, I agree with you that --

5 MR. DORCHAK: This argument may be made before an
6 English court after the motion is granted. In other words
7 after you grant the motion --

8 THE COURT: Right.

9 MR. DORCHAK: -- and then let's argue in England
10 about whether -- what the effect of the rejection of
11 executory contracts would be.

12 THE COURT: Okay. Maybe you and I disagree about
13 that the question before the English court will be the
14 effect of the rejection. I think it's --

15 MR. DORCHAK: I don't know if it matters,
16 Your Honor. If you agree with me that this is an issue that
17 you, the bankruptcy judge, should be deciding, because I
18 want you to decide it.

19 THE COURT: Wait. No, you want me to say they
20 can't do what they want to do.

21 MR. DORCHAK: Absolutely.

22 THE COURT: Right? But you're not saying that if
23 I agree with LBHI that you want the whole next step to
24 happen here.

25 MR. DORCHAK: No, I don't want that to -- I don't

1 want that either. Maybe you don't want that, Your Honor, I
2 don't want that. I don't think anyone wants that.

3 THE COURT: Right.

4 MR. DORCHAK: All I'm trying to say is this, it's
5 my characterization of their reply that they're trying to
6 duck a difficult issue that is about rejection of contract
7 by saying but wait, wait, wait we'll take care of it later.
8 And I'm saying, no, we can take care of it now because this
9 is a Bankruptcy Code issue. That's all, Your Honor, and I
10 think it sounds like you agree with you that this is your
11 issue. So so far so good.

12 THE COURT: No, no, no, that's -- you're -- I
13 don't know if we're conflating or we're glossing over, but
14 you are attempting to characterize what would be before the
15 English court as an interpretation of the effect of rejected
16 executory contracts here, and I don't agree with that.

17 I think it's pretty clear -- made pretty clear by
18 Lehman that whether or not the next step could happen would
19 be an issue for the English court. I simply don't see that
20 as implicating an interpretation of the rejection of
21 executory contract. So --

22 MR. DORCHAK: Okay.

23 THE COURT: -- you know, I think it's neither here
24 nor there.

25 MR. DORCHAK: Whether these partnership agreements

1 were contracts that were executory and then rejected under
2 the plan?

3 THE COURT: No, I think it's neither here nor
4 there whether you and I can come to an agreed --

5 MR. DORCHAK: All right.

6 THE COURT: -- statement of the issue.

7 MR. DORCHAK: Okay.

8 THE COURT: Okay?

9 MR. DORCHAK: If you let me address the issue of
10 whether indeed the partnership agreements were executory
11 contracts that were --

12 THE COURT: Sure. That's my issue.

13 MR. DORCHAK: That's what I said, Your Honor.

14 THE COURT: No, it's not, but go ahead.

15 MR. DORCHAK: That's what I was trying to say.

16 THE COURT: Right.

17 MR. DORCHAK: Okay. So I don't know if there are
18 any other disputed fact issues here. I mean if it needs to
19 be briefed we can brief it. But I think it's perfectly
20 simple.

21 In this jurisdiction an executory contract is one
22 in which "each party must still give something to get
23 something." That's from In re: Riadinzio (ph), a 1997 case,
24 but it's really sort of modified countrymen.

25 THE COURT: Countrymen rule. Modified countrymen.

1 Okay.

2 MR. DORCHAK: Exactly.

3 Now, we wouldn't really be here right now unless
4 it were true that on the one hand, according to them, the
5 general partner has to do something, issue notices, go talk
6 to clear stream, et cetera, et cetera, to get this
7 substitution effected and that LBHI has to do something, in
8 other words show up with some preferred securities in order
9 to get the substitution effect, and both sides have to do
10 something in order to get the substitution. That was true
11 on the petition date, it's an executory contract.

12 I don't know what you can say to the contrary, and
13 I don't think there's any dispute that if it was an
14 executory contract on the petition date it was rejected
15 under the plan because it's not expressly assumed. They
16 didn't dispute that.

17 And they go on and say well kind of so what if it
18 was rejected? And again it's in a footnote, but this -- now
19 that's the point they're trying to make. Rejecting a
20 contract doesn't kill off the contract, right, as if that's
21 what I said it did. We all know that, Your Honor. I don't
22 need to be educated on that. Certainly you don't need to be
23 educated on that because you have issued orders and
24 judgments insisting that the terms of a contract that's been
25 rejected would have to be enforced any way.

1 THE COURT: Sure.

2 MR. DORCHAK: And there's no dispute. There's
3 case -- I'm not arguing the contract --

4 THE COURT: Right.

5 MR. DORCHAK: -- I hope you don't think I'm
6 being --

7 THE COURT: Hope.

8 MR. DORCHAK: -- childish. There's arbitration
9 provisions and choices of law and caps on damages and of
10 course there's a distinction made.

11 THE COURT: Right.

12 MR. DORCHAK: No question. All right. Good.

13 But even though the terms remain enforceable the
14 one thing the debtor can't do, having rejected the contract,
15 is force the other side to keep performing as if the
16 contract were still in force. I think you'll agree with
17 that. I got a quote from Judge Gerber, I could have gotten
18 other ones, I'll just say it out loud, "The rejection
19 excuses future performance under that contract by the
20 contract of counterparties."

21 So whatever else might be true under these
22 partnership agreements the one thing, if it was a rejected
23 contract under the plan, the one thing the debtor can't do
24 is force the general partner or the ECAPS holders to go
25 ahead with this substitution. They can't -- they're not

1 allowed to do that. And I think they can't because as I
2 just said, it's an executory contract that was not assumed
3 under the plan it was therefore rejected. Like whether the
4 breach of material? That doesn't matter. It's cut and
5 dried in my opinion, and of course that's the way I put it,
6 Your Honor, but I hope you see why I have reason to do that.
7 So that's my last legal point is the rejection. This is
8 with reference to Section 365(g) of the Bankruptcy Code, so
9 it was backing away as a matter of law with no disputed
10 facts and just a couple unambiguous quotes from the
11 partnership agreement and the amended charter and the
12 amended bylaws.

13 I think it's clear that the relief that's being
14 sought here contradicts Section 1127, Section 1123, Section
15 1142, and Section 365(g), and that's even if the goal, a
16 laudable one generally, is to maximize distributions to
17 creditors.

18 THE COURT: Okay. Thank you.

19 MR. DORCHAK: Thank you, Your Honor.

20 THE COURT: All right. Does anyone else from the
21 objectors wish to be heard?

22 MR. BAREFOOT: Good morning, Your Honor. Luke
23 Barefoot from Cleary Gottlieb for Barclays Bank PLC.

24 Your Honor, we certainly respect the hard work and
25 efforts that have resulted in the substantial distributions

1 to creditors that Mr. Fail addressed, but as I think
2 Your Honor put it, the sole question here today is not
3 whether additional distributions to creditors are desirable,
4 but whether what LBHI wants to do can be authorized under
5 this plan.

6 And I know we've been accused of a lot of
7 rhetorical flourish, so I'm going to stick instead to the
8 exact text of what the debtors are asking Your Honor to
9 order.

10 They're asking this Court to live in a fictional
11 world where these shares would be issued as if it were 2008
12 and then have those shares be treated as if they were
13 canceled by the plan.

14 And I'm not characterizing this, this is from the
15 literal text of the proposed order that they're asking
16 Your Honor to sign.

17 The third ordered paragraph provides that the
18 substituted preferred shares will be compromised in
19 accordance with the plan as if those substituted preferred
20 shares were issued on the commencement date. But we all
21 know that on the commencement date LBHI was doing anything
22 other than issuing new preferred equity, and it's not in
23 accordance with the plan or with any of the other provisions
24 that Mr. Dorchak has cited to have this Court close its eyes
25 to reality and live in a fictional as if world.

1 And there's one provision of the plan in
2 particular that I want to address that I think makes this
3 very clear. The core of the relief that the debtors are
4 seeking is to classify these retroactively as if shares in
5 Class 12 of the plan so that they will be canceled and
6 valueless, but that is completely inconsistent with the
7 distribution provisions that Class 12 provides. That's in
8 Section 4.17(c) of the plan, which after this single share
9 is issued to the plan trust there are still provisions for
10 distributions to holders of Class 12 interest. And what the
11 plan provides very clearly is that those distributions will
12 be made "consistent with such holders' rights of payment as
13 they existed immediately prior to the petition date." Not
14 on the petition date, not after the petition date,
15 immediately prior to the petition date.

16 But the shares that the Court is asking to be
17 authorized to issue won't be issued prior to the petition
18 date, they need to be issued following the petition date,
19 and that's very strategic and very important, because in
20 order for this to be a triggering event that would even
21 arguably resolve in a substitution it needs to be occurring
22 after the petition which triggered that potential right.

23 It's simply completely inconsistent to say that
24 we're going to be classified in Class 12 to say that the
25 Court can issue this order in furtherance of implementation

1 of Class 12 when these shares, if they are issued under this
2 fiction on the commencement date, would exclude the ECAPS
3 holders from the very distribution mechanics that Class 12
4 provides, which is only for holders of shares that existed
5 prior to the petition date. And I don't think this is a
6 technical term, but in any event I think it also helps
7 underscore expectations and economic reality.

8 The plan was drafted this way to allow
9 distributions only to holders of equity interest that
10 existed prior to the petition date because those are the
11 only shares that there were. No one ever contemplated, and
12 the plan didn't contemplate, that there would be
13 subsequently issued shares. And LBHI has no textual
14 response to this or explanation for this. The only
15 explanation they have is that this is consistent with the
16 economic realities of what the ECAPS holders should have
17 expected, but the substitution simply never occurred prior
18 to the petition date or prior to confirmation.

19 So what the ECAPS holders expected is what the
20 terms of the plan say, that Class 12 distributions will only
21 apply to holders of shares that existed prior to the
22 petition date.

23 They also try to cite, as Mr. Dorchak noted, to a
24 bunch of other orders that Your Honor has entered
25 reclassifying existing claims as equity interest that would

1 then be subject to Class 12, but those claims or
2 recharacterized themselves existed prior to the petition
3 date. So it's perfectly consistent for them to receive
4 distributions and be classified in accordance with the
5 actual terms of Section 1417(c) where they would receive
6 distributions in accordance with their prepetition date
7 rights.

8 I also just briefly wanted to address Your Honor's
9 question about whether this is an alteration of the legal
10 relationship in reference to this distribution section.

11 Mr. Dorchak was pointing out the very valid point
12 that by subjecting us potentially to these proceedings in
13 England that itself is a legal alteration. I don't even
14 think you need to go that far. Issuance of new shares that
15 would be attempted to be distributed to these holders
16 in lieu of our existing ECAPS securities that both LBHI and
17 our clients believe had value, that itself is an alteration
18 of legal rights in a much more fundamental way that makes
19 clear that the plan is a modification within the meaning of
20 1127.

21 The only other point, Your Honor, I wanted to
22 address is the debtor's suggestion in paragraph 35 of their
23 reply that the Court need not really address many of these
24 questions because they have existing omnibus authority to
25 allow claims, including claims in Class 12, in the plan

1 administrator's sole discretion.

2 I think it's important to recognize that everyone
3 knows that that's not going to get them where they want to
4 go. We all agree that the plan administrator has the
5 authority to allow claims, but they're not seeking to just
6 allow a claim for us in Class 12, they're seeking to issue
7 new preferred shares that will then be canceled under Class
8 12, and it's that issuance that they don't have the
9 authority to do and that they can't do in a manner that's
10 consistent with the provisions of Class 12 of the plan.

11 THE COURT: Okay. Thank you, Mr. Barefoot.

12 MR. BAREFOOT: Thank you, Your Honor.

13 THE COURT: Hold on. Good morning.

14 MR. GRAHAM: Good morning, Your Honor. Joe Graham
15 of Kirkland & Ellis, on behalf of the joint liquidators.

16 I stand in large part to make sure that in case
17 standing becomes an issue we have stepped up as we are an
18 actual creditor -- a direct creditor of the reorganized
19 entity.

20 I also wanted to just clarify from the
21 partnership's view obviously this is the first of a
22 potential two-step process, the second part of that process
23 likely happens in the high court of London, but
24 notwithstanding discussion about rejection contracts here
25 today, but we don't know that we have to get there and waste

1 our very limited resources on that process.

2 So (indiscernible) under 1142 you do have the
3 power obviously to issue any orders, but we don't know that
4 this actually applies, and you've been asking questions
5 about that, and one of them is, you know, the two ways you
6 can do it is transfer of property dealt with by a confirmed
7 plan or perform any other act necessary to consummation.

8 And in our view we have a hard time seeing how
9 issuing shares that have been canceled already are necessary
10 to consummation of that plan, a plan that was very clear
11 that there was one share issued, one share to the plan
12 trust, and as my colleagues over here have mentioned
13 already, that you know, distributions would be done in
14 accordance with peoples' rights as of the commencement date.

15 So we just -- I'm a debtor lawyer by trade, I like
16 aggressive reads of plans, we just don't know in this
17 instance whether -- we don't believe that in this instance
18 1142 actually authorizes this.

19 Thank you.

20 THE COURT: All right. Thank you, Mr. Graham.

21 Okay. Looks like that completes the presentations
22 by the objectors. Mr. Fail?

23 MR. FAIL: Thank you again, Your Honor.

24 THE COURT: To the extent that you can reply
25 specifically to the arguments that were made that would be

1 helpful to me.

2 MR. FAIL: Sure. It sounded like there was one
3 question at the beginning but there are a lot of points to
4 rebut.

5 THE COURT: Yep.

6 MR. FAIL: I think before jumping in to respond
7 specifically I would just say as an overall matter not one
8 of the parties that spoke suggested that this wouldn't --
9 that this would harm any creditor or equity holder. It's
10 not a matter of standing, but from the Court's perspective
11 and the debtor's perspective, this is -- these are arguments
12 made by investors outside of the U.S. Chapter 11 capital
13 structure that made investments at some point in time either
14 prebankruptcy or most likely post-bankruptcy, but there's no
15 doubt that this is beneficial to all creditors.

16 I was taking notes so I'll respond in the order
17 that the comments were made.

18 THE COURT: Okay.

19 MR. FAIL: I apologize if it -- if some of them
20 are repetitive. I think some of the arguments overlapped.

21 There was a comment originally that it's
22 extraordinary to go back in time. Your Honor, the word
23 extraordinary has been used many times in this case because
24 these are extraordinary cases, we're standing here ten years
25 later, and so the fact that the cases are still open and

1 we're still distributing billions of dollars doesn't -- the
2 fact that this is described as extraordinary we don't
3 necessarily agree, but it's unique and that doesn't scare
4 the plan administrator.

5 There was a question about section -- subsection 3
6 and 6.1(b). I think that was misdirected or rather not
7 relevant that it's a subsection and therefore shouldn't be
8 allowed. You have to look at the intro, but when you look
9 at the intro 6.1(b) is what you can do without authority of
10 the Court. We're here seeking authority of the Court to do
11 stuff in furtherance. We're here because we believe we need
12 the Court's authority or assistance in doing this. So
13 arguments that we couldn't do it without, I mean we're here,
14 Your Honor, we're seeking permission.

15 And so with your authority we believe we can do it
16 and that there is ample authority under 1142 using Section
17 105 to bolster it in connection with 6.1 of the plan, the
18 charter that LBHI has to collect assets.

19 There was a discussion about 1123(a)(6) that
20 Your Honor went into that the charter has to say no
21 issuance.

22 Your Honor, we're not looking to amend the current
23 charter although the confirmation order in paragraph 51 says
24 that the debtors can, and as in most post-reorganized
25 company the purpose of bankruptcy is to live on and charters

1 can be amended over time. This plan is no different. But
2 we aren't seeking, to be very clear, to amend the current
3 charter. We are looking to issue in the future, not
4 retroactively, not pretending it happened, we're here today
5 to ask for permission and authority to issue stock that will
6 be compromised under the plan, stock that will permit it not
7 to be in violation of 1123(a)(6). It's just the same as if
8 we were allowing additional claims reclassifying claims.

9 There was talk about, you know, we're altering
10 legal relationships and affecting parties that weren't
11 parties. Let me address those each two separate things.

12 One was, you know, we shouldn't consider that
13 judge you allow claims all the time. But let's just think
14 about the magnitude of these unique cases.

15 Subsequent to the effective date in these cases
16 11,276 claims have been resolved. I would suggest that that
17 is a unique circumstance that the plan was confirmed and
18 different parties came in, some had their claims allowed
19 late, some were allowed to modify and supplement and amend
20 their claims against the debtor's objection, but months and
21 years after the petition date. So the debtors don't find
22 the reasoning persuasive and we hope that you won't.

23 In 2017 and 2018 alone giving credit to a little
24 bit over I couldn't decide -- you know, couldn't discern
25 specifically after the GP was reconstituted -- but 513

1 claims alone were allowed in 2017 and 2018. Work continues
2 and relationships are being altered, and each one is being
3 allowed or disallowed as a prepetition claim as of the
4 effective date in accordance with the Code in allowance of
5 claims. So we don't think that that is anything
6 substantial.

7 What else was discussed? There was a discussion
8 about now the ECAPS holders can be sued. To be very clear,
9 parties around the world could be sued by Lehman Brothers
10 Holdings Inc. as plan administrator on behalf of any of its
11 debtors or on behalf of any of its controlled affiliates.
12 It's specifically preserved in the confirmation order in
13 paragraph 76.

14 We are also specifically in litigation around the
15 world, including in the courts in England. And to be very
16 clear, Deutsche Bank can be sued here before this Court or
17 in others in the United States. And I'm told and informed
18 that the estates in conducting an inquiry into Deutsche Bank
19 in connection with the ECAPS and they should be on notice
20 for document preservations and the like in accordance with
21 that, but there's no merit whatsoever to the fact that this
22 ruling here will give a basis to sue Deutsche Bank. That's
23 not the intention, it's not necessary.

24 There was a comment about Section 1142 that we
25 didn't say anything in our reply. I think we said it all in

1 our motion, Your Honor, I think the statute says it, and
2 we've pointed out to -- we've pointed to the Court's
3 authority under 1142 and 105, we've given examples where
4 we've pointed to the plan provisions that do that, we said
5 it's consistent to allow us to operate under the state law
6 but now they're saying that it's a big deal and it's a side
7 show, but took up a substantial portion of their brief so we
8 responded to it.

9 There was no mention in their objections to
10 Section 303 of the Delaware Corporate Code, but when we did
11 look at it it was very helpful and pointed us right to why
12 we need this order.

13 THE COURT: Mr. Fail, slightly off topic though,
14 there was some mention of the amount at issue. What's your
15 -- do you have a sizing of the aggregate amount that's at
16 issue here?

17 MR. FAIL: I wish it were a simple answer,
18 Your Honor.

19 THE COURT: Okay.

20 MR. FAIL: It depends on the outcome of a number
21 of different positions that are being litigated by these
22 parties and others in the courts of England that are at
23 different levels of trial on appeal.

24 THE COURT: All related to this?

25 MR. FAIL: All touching this. Lehman continues to

1 be a web. So the value of the assets of each of the
2 partnerships, which is really what we're talking about, the
3 value of the sub-debt of Lehman Brothers Holdings PLC is not
4 known. It'll depend on the outcome of other litigation. If
5 Deutsche Bank has its way and others that are taking that
6 position it might have tremendous value, hundreds of
7 millions of dollars.

8 THE COURT: What do you mean if Deutsche Bank has
9 its way?

10 MR. FAIL: If Deutsche Bank's arguments are
11 persuasive in various aspects. I'm not the most familiar
12 with the various litigations that are going on in the UK.

13 THE COURT: Oh, in other parts of the web.

14 MR. FAIL: Not here, in the UK --

15 THE COURT: Okay.

16 MR. FAIL: -- in courts, and depending on the
17 recoveries on the sub-debt of PLC's sub-debt --

18 THE COURT: Okay.

19 MR. FAIL: -- that is yet to be determined and
20 it's -- so it's hard to say if there will be value, but
21 Deutsche Bank revived the trust believing that there is
22 value to be had. If there is value to be had it could be
23 very significant even in the Lehman world in Lehman dollars.

24 THE COURT: So what -- and you talk about getting
25 existential -- so where was that value, what was it doing,

1 who held it, who was looking out for it --

2 MR. FAIL: That's a great point, Your Honor.

3 THE COURT: -- before the revival?

4 MR. FAIL: That's a great point. It goes to the
5 delay argument, and they're saying -- you know, there were
6 arguments that we think will be before the UK court and not
7 necessary here, but what is the harm of it coming up now?

8 THE COURT: My question is very specific though.
9 If a partnership is dissolved --

10 MR. FAIL: The assets go to the crown, as they
11 say, across the pond. The entities were dissolved and the
12 UK government essentially bolted. They were reinstated as
13 talked about retroactive --

14 THE COURT: And the UK government gives it back?

15 MR. FAIL: The actions that the -- that Deutsche
16 Bank and others took in the UK to establish the liquidators
17 that are standing here today brought back the general
18 partner and the partnerships as if they had never gone away.
19 So it's okay to do it in the UK, for example, six years
20 later just before the statutory deadline to do it
21 retroactive as if they existed in time. It's ironic, I
22 know, Your Honor, that they're saying that we shouldn't be
23 able to do something retroactively.

24 THE COURT: But then with that debt -- so that
25 debt literally --

1 MR. FAIL: It's sitting there and whether they
2 filed a claim or not or whether they have to file a claim
3 they don't have bar dates as I understand in the UK as we
4 do. PLC has not made a distribution on account of the sub-
5 debt yet. There is literally no harm in the passage of
6 time. The amount of the distributions, they're not sitting
7 on the proceeds of the sub-debt yet. I don't -- I'm not
8 even positive if they actually filed claims, but I don't
9 know that that's prohibited of them receiving recoveries.
10 In other words we're just in time to do it.

11 The litigations are advancing in the UK and at
12 some point we will know what the value is, but we're just in
13 time. They've acted to bring back the partnership, the
14 general partner retroactively. I mean folks glossed over
15 the time periods that they originally articulated and made a
16 lot out of oh, we're eight years, ten years past the
17 bankruptcy, but the general partner who's charged with
18 (indiscernible) leading a substitution, the general partner
19 who's represented here today, dissolved in June of 2010. At
20 that point there was no one to effectuate the substitution.
21 They were revived and we moved forward in this court to
22 continue what should be done.

23 And in terms of whether or not there was a comment
24 later on in the discussion about could we enforce our
25 rights, could we force them to do that, I don't know about

1 -- and I'm happy to argue and we can brief further -- but
2 our position is that we could under the Bankruptcy Code and
3 under the contract law and under case law here in the U.S.
4 compel someone when our breach was not material as it wasn't
5 here, but regardless in the UK LBHI will preserve and assert
6 all of its rights that it has as the general partner of the
7 partnerships and preferred limited partner.

8 We believe that that -- liquidators have
9 obligations to us as well and not only to the ECAPS holders
10 or not at all to the ECAPS holders if we're right.

11 So that'll be an issue, that'll be litigated in UK
12 as well, but whether or not we can compel them to under U.S.
13 law and contracts here or under the obligations that the
14 liquidators have in the UK we don't have to get into today,
15 respectfully.

16 THE COURT: Okay. The other question somewhat
17 unrelated to the merits that have been argued here today is
18 this unlike any other litigation, can the parties not try to
19 resolve this on some sort of a comprehensive basis?

20 I mean it seems as if there's a very
21 long/expensive litigation path over what looks to be, you
22 know, a high-class problem, that there's value that's been
23 found. Is there any prospect of settlement discussions
24 between and among the parties?

25 MR. FAIL: Your Honor, our --

1 THE COURT: I mean mind you I'm --

2 MR. FAIL: Yeah.

3 THE COURT: -- largely in the dark about this --

4 MR. FAIL: The plan administrator --

5 THE COURT: -- web of litigation.

6 MR. FAIL: The plan administrator has not run to
7 this Court as the first option in any case that I'm familiar
8 with. The plan administrator has worked to try to reach
9 resolutions. There has been litigation and there continues
10 to be litigation.

11 The way it came up in conversation this morning
12 though the fact that, you know, this could be burdensome to
13 the liquidator does not ring true or appeal or at all
14 persuasive to LBHI whose money we believe it is for our
15 creditors.

16 This is one litigation that is now going on as,
17 you know, we're in year nine of the liquidation of the UK
18 entities. It's-- I don't want to say laughable because
19 that's too dismissive -- but you know, it's not persuasive
20 at all that this piece of litigation is the one that's going
21 to break anybody's -- the straw that's going to break
22 anyone's back and therefore we should just give up
23 potentially hundreds of millions of dollars. LBHI will
24 pursue its rights.

25 We're happy to engage in settlement discussions

1 with any party and we've attempted it and we're here today.

2 THE COURT: All right.

3 MR. FAIL: Respectfully.

4 THE COURT: Anything else?

5 MR. FAIL: Let me just see if there were other
6 points that just need to be responded to briefly.

7 We spoke about 1142.

8 Your Honor understands the difference between
9 consummating and substantially consummated.

10 We talked about the claims that have been allowed.

11 I made the clarification that we're not looking to
12 do something retroactively just although -- and I point out
13 that the trusts themselves and the preferred -- the
14 partnerships were brought back to life retroactively under
15 UK statute.

16 We don't believe this contradicts the plan. We're
17 giving stock that will be compromised pursuant to the plan.
18 That's very important. It would be different if we were
19 saying we wanted to pay out dividends on preferred equity
20 now that was prepetition ahead of prepetition creditors.
21 Specifically we're not doing that. That would be something
22 that is different and certainly we're not looking to skip
23 the waterfall of priority that's required by the Code or our
24 plan.

25 If Your Honor chooses to decide the rejection

1 issue we're happy to brief it and I pointed that out.

2 Going back to the first point I made about this
3 not being taken on behalf of any creditor or equity holder
4 acting as such. The references to the definition of equity
5 interest in the plan is an attempt to get a real gotcha.
6 It's very, very clear what the expectations of prepetition
7 ECAPS investors was. It's in the prospectus. It says
8 "intended to provide holders with rights on liquidation of
9 the issuer," you know, which it is in liquidation,
10 Your Honor, "equivalent to non-cumulative preferred stock of
11 LBHI." That's everyone's expectation.

12 Also during the cases before it dissolved the
13 general partner sought to substitute that. That was also
14 known and should have been an expectation.

15 LBHI has been pursuing recoveries around the world
16 at every option. That should be everyone's expectation. I
17 think it is with the parties with whom we're here today and
18 with whom we are engaged in litigation in the U.S. -- in the
19 UK, Your Honor.

20 I would also just point out in the confirmation
21 order paragraph 75 on the point of definition of equity
22 interest says, "The definition of equity interest included
23 in the plan is without prejudice to the debtor's right to
24 object to or seek to subordinate any claim and any
25 creditor's rights to defend against such action." That's

1 paragraph 75 of docket 23023. Right?

2 So we knew things were going to happen after the
3 bankruptcy, that was put in for RSUs, that was put in for
4 other circumstances that would come up and did come up.
5 This Court has allowed the result that parties that aren't
6 entitled to senior recoveries out of LBHI's assets get them
7 in the appropriate way.

8 We're not looking to change the golden share.
9 There is one share, it's held for parties. We're saying who
10 would get it in the unlikely event that there is a waterfall
11 to be had that allows it to happen?

12 We talked about late claims. We talked about I
13 think all of the other points that need to.

14 Your Honor, I'm obviously happy to answer any
15 other questions. The plan administrator has put a lot of
16 thought into this and wouldn't have proceeded if we don't
17 think that there's a viable path to recovery for its
18 creditors here.

19 THE COURT: Okay. Thank you, Mr. Fail.

20 MR. FAIL: Thank you.

21 THE COURT: Okay. All right. Thank you all very
22 much. We're going to take this under advisement and we'll
23 get back to you when we're ready to issue a ruling. Okay?
24 Thank you all. Have a pleasant day.

25 (A chorus of thank you)

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(Whereupon, these proceedings were concluded at 11:04
a.m.)

* * * * *

C E R T I F I C A T I O N

I, Dawn South, certify that the foregoing transcript is
a true and accurate record of the proceedings.

Dawn South

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